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No. 92-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

WALTER A. SMITH, JR.*
DAVID G. LEITCH
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONERS' SUPPLEMENTAL BRIEF

At the Court's request, the Acting Solicitor General has expressed the views of the United States regarding the petition for a writ of certiorari in this case. *See* Brief for the United States as Amicus Curiae ("U.S. Brief"). In order to respond to that brief and to present information not available when petitioners (the "Airlines") made their last filing, the Airlines submit this supplemental brief in support of their petition. *See* S. Ct. Rule 15.7.

Significantly, the Acting Solicitor General does not dispute the nationwide importance of the statutory issue presented in this case. Neither does he deny that uniform

resolution of that issue is important. Nor does he challenge our submission that the lower courts are in conflict over that issue. Instead, he contends only that the Sixth Circuit's resolution of the issue is consistent with federal policy. While we dispute that that is so, it in no way responds to our contention that the issue is important and that a conflict exists in the circuit courts over its resolution. Curiously, the only significant point the Acting Solicitor General makes is that, in his view, the Sixth Circuit—as well as every other court deciding this issue, *see* U.S. Brief 10-11 n.7—was incorrect in concluding that a private right of action is available to challenge the imposition of airport fees. Not only is this contention completely unresponsive to the issue presented in our Petition, but it is difficult to understand why the Acting Solicitor General makes the argument at all if he opposes review. Indeed, if he is correct in his view that the lower courts' decisions on this issue are uniformly erroneous, his assertion that review is not warranted is a surprising one given the importance of the issue. Finally, his assertion that petitioners' Commerce Clause argument is precluded by the statute at issue is directly contrary to this Court's precedents.

DISCUSSION

1. The United States asserts that the decision below "does not conflict with federal law and policy." U.S. Brief 6. According to the United States, "[t]he Secretary's policy is that rates and charges should ordinarily correspond to the costs incurred in providing [airport] facilities and services . . . ." *Id.* at 8. But that is precisely the Airlines' argument. For it is undisputed that the rates and charges assessed by the Airport do not correspond to the costs it incurs in providing facilities and services. Quite to the contrary, the Airport is reaping what even the United States admits is a "sizable surplus." *Id.* at 3. Moreover, as the United States acknowledges, it is also federal policy that a commercial air carrier not

be assessed charges substantially higher than its own "properly allocated costs." *Id.* at 8-9. One would have thought these two concessions would cause the United States to argue that it is the Seventh Circuit in *Indianapolis Airport Authority* v. *American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), and not the Sixth Circuit here, that is in accord with "federal policy." For it was the Seventh Circuit (through Judge Posner) that held that an airport is not permitted under the AHTA (49 U.S.C. App. § 1513) to earn vast surpluses far in excess of its costs, and it was the Seventh Circuit (through Judge Flaum) that held that airport costs are not "properly allocated" where the non-aeronautical users (concessionaires) are allocated *none* of an airport's airside costs.

2. Although the United States nevertheless suggests that the Sixth Circuit has correctly applied federal policy, it does not—and cannot—dispute that the Sixth and Seventh Circuits are in conflict on that issue. Indeed, the United States *confirms* that "the interpretation of AHTA by the court of appeals in this case does differ from that of the Seventh Circuit. . . ." U.S. Brief 6. *See also id.* at 17 (recognizing "tension" between the cases). The United States, however, argues that this conflict does not warrant the Court's review because *Indianapolis* "is limited by its facts" and because there has been "relatively little litigation" concerning airport fee structures. *Id.* at 6. Neither of these points is valid.

First, the Acting Solicitor General was correct in his initial assertion that the real difference between this case and *Indianapolis* lies in the courts' "interpretation of AHTA," *id.*, not in the facts of the two cases. And although the Sixth Circuit purported to distinguish *Indianapolis* on the ground that the airport in that case enjoyed a locational monopoly, the actual question in both cases was whether the airports' similar policies regarding fees comported with the requirements of the AHTA. The

Seventh Circuit merely referred to monopoly power as an explanation of the *ability* of the airport to impose unreasonable fees, *not* as a prerequisite to the determination that such fees are unlawful. *See* Pet. 14 n.8. Had this case been brought in the Seventh Circuit, it is plain that the fact on which the United States relies to distinguish the case would not have affected the outcome and that *Indianapolis* would have compelled a different result. This case thus presents precisely the type of conflict on an important question of law which merits this Court's review.

Second, it is simply not the case that airport fee structures have generated relatively little litigation. Since this Court's decision in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and the subsequent enactment of the AHTA, there have been numerous reported decisions construing the AHTA and the reasonableness of airport fees. *See* Pet. 15; U.S. Brief 10-11 n.7. Moreover, only recently, a similar case was filed against the Allentown, Pennsylvania airport, *Lehigh-Northhampton Airport Authority* v. *USAir, Inc., et al.*, No. 93-CV-2026 (E.D. Pa., filed April 30, 1993), and attempts by the City of Los Angeles to apply significant profits from fees at Los Angeles International Airport to general city expenses will likely lead to litigation in the near future over the validity of those surpluses. *See* "Legality of Airport Proposals Questioned," *Los Angeles Daily News* (April 1, 1993). In any event, given the huge stakes presented in these cases and their importance to the precarious airline industry, other suits outside the Sixth Circuit will inevitably follow if this Court denies certiorari.

This Court should not wait for still further suits to resolve the important issue presented here. As the United States' own brief demonstrates, this case plainly involves a significant issue that has already divided the circuit courts and upon which there is a pressing need "to achieve uniformity." U.S. Brief 10. Although the United States

advocates achieving that uniformity in a different manner than do petitioners (through review by the Federal Aviation Administration), the requisite uniformity cannot be achieved without review by this Court, for there already exist two competing approaches in the circuits to the issues presented.

3. As noted, the United States spends the bulk of its brief discussing whether a "private right of action" exists under the AHTA (*see* U.S. Brief 9-16)—an issue upon which petitioners prevailed in the Court of Appeals, which was not discussed either in the petition for certiorari or in respondents' opposition, and on which no cross-petition was filed. To the extent that the issue is relevant and preserved, it militates in favor of granting certiorari in this case. Indeed, as noted, it is not clear why the United States has not urged the Court to do so, given the importance of the issue, the large number of lower courts that have decided it, and their unanimous view that a private right of action does exist. *See id.* at 10-11 n.7.

4. Finally, the United States confirms that under this Court's precedents, Commerce Clause review is mandated unless Congress has "expressly stated" its "unambiguous" intent to permit State regulation that would otherwise unduly burden interstate commerce. *See* U.S. Brief 18 (quoting *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982), and *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 802 (1992)). The Sixth Circuit, by contrast, held that Commerce Clause review is available only if "Congress ha[s] taken no other action to regulate the area." App. 16a. As petitioners have explained, when the *correct* standard is applied, it is unassailable that the AHTA evinces no "express" and "unambiguous" intent to foreclose Commerce Clause review over airport fees. *See* Pet. 19. To the contrary, Congress intended for the AHTA to set a *stricter* standard than this Court in *Evansville* had applied under the Commerce Clause, not to authorize actions that would otherwise violate that Clause. Although the United

States argues that the AHTA leaves "no doubt" that Congress intended to permit additional state taxation, it makes no effort to meet this Court's requirement that such intent be "expressly stated." The effort, of course, would be unavailing, for Congress has *not* expressly stated such an intent. The Sixth Circuit therefore plainly departed from this Court's precedents and erred in refusing even to conduct a Commerce Clause analysis of the excessive fees charged here.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari and petitioners' reply brief, the petition should be granted and the judgment below reversed.

Respectfully submitted,

WALTER A. SMITH, JR.*
DAVID G. LEITCH
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Counsel for Petitioners

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